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In the Supreme Court of the United States

OCTOBER TERM, 1978

BAY MEDICAL CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17-23) is reported at 588 F.2d 1174. The decision of the National Labor Relations Board (Pet. App. 40-50) is reported at 224 N.L.R.B. 69. The decision of the Board directing an election in the related representation proceeding (Pet. App. 26-39) is reported at 218 N.L.R.B. 620.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24) was entered on January 23, 1979. The petition for a writ of certiorari was filed on April 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly excluded licensed practical nurses from a unit of technical employees.

STATEMENT

1. Petitioner operates two hospitals, Mercy and General, as divisions of a single nonprofit corporation (Pet. App. 28). Since at least 1972 the licensed practical nurses (LPNs) at General have been represented by the Michigan Licensed Practical Nurses' Association (MLPNA), which had a collective bargaining agreement with petitioner running from March 1, 1974, to February 28, 1977 (Pet. App. 29).

In the autumn of 1974, Local 486 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 486) filed petitions with the Board requesting representation elections in a unit of unrepresented technical employees at each hospital, or, alternatively, an election in a combined unit of all the technical employees of both hospitals (Pet. App. 29). Petitioner opposed the petitions on the ground, *inter alia*, that the appropriate unit was a broader unit including not only

various technical employees at both hospitals but also the janitors, housekeepers, and other non-professional, non-technical employees at Mercy (A. 9).[1]

Following a hearing the Board issued a decision and direction of election; it ruled that "a unit consisting of all technical employees [at both Mercy and General] would be appropriate" (Pet. App. 14-15).[2] In so doing, the Board decided that, although it normally included LPNs in such technical employee units, it would not do so in this case because (Pet. App. 31-32):[3]

> the record indicates an established bargaining history among the LPNs at General who are currently represented for collective-bargaining purposes by Intervenor MLPNA, which has a contract with the Employer that will not expire until February 1, 1977. We do not desire to up-

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[1] At that time, both Local 486 and petitioner opposed the inclusion of the LPNs in the proposed units (A. 4, 6, 9). ("A." refers to the appendix to the briefs in the court of appeals.) Intervenor MLPNA urged that the Mercy LPNs be accreted to the unit of General LPNs which it presently represented (Pet. App. 13-14, n.3).

[2] The Board rejected Local 486's request for a unit of then unrepresented housekeepers, janitors, and linen aides at Mercy, finding that it was inappropriate because, *inter alia*, that proposed unit did "not even seek to encompass all of the service and maintenance employees * * * but instead [would have covered] a fragmented part of such a unit" (Pet. App. 34-35).

[3] Members Penello and Kennedy concurred in the Board's dismissal of the petition for a unit of housekeepers (Pet. App. 37-38). They dissented from the finding that a separate technical unit was appropriate, stating that they "would require all technical employees to be included in a broad service and maintenance unit" (Pet. App. 38).

> set the stability inherent in that bargaining relationship by disenfranchising the LPN's at General and including them in the above technical unit. Nor do we think it proper to include in the above technical unit the LPN's at Mercy who are currently unrepresented. Such a finding would have the anomalous effect of fractionalizing the representation of the LPN's employed by the employer, a state of affairs which we are congressionally mandated to avoid. (However, we wish to reiterate that our exclusion of LPN's from this technical unit is restricted to the facts of this particular case.)

Local 486 won the election and, on September 18, 1975, the Board's Regional Director certified Local 486 as the unit's collective bargaining representative, over further objections of petitioner concerning the definition of the unit (A. 35-37, 38-44). Petitioner filed a request for review with the Board, contending, among other things, that LPNs had been improperly excluded from the definition of the bargaining unit; the Board denied review on the ground that the request raised "no substantial issues" (Pet. App. 43; A. 44-49).

2. Petitioner subsequently refused to bargain with Local 486. The Board found that petitioner's refusal to bargain violated Section 8(a)(5) and (1) of the National Labor Relation Act, 29 U.S.C. 158(a)(5) and (1), and it ordered petitioner to recognize and bargain with Local 486 (Pet. App. 40-52).

3. The court of appeals enforced the Board's order, finding that the Board acted within its authority in considering the bargaining history of petitioner

and the LPNs (Pet. App. 21-23). The court noted that, at the time the Act was amended to extend coverage to nonprofit health care institutions, the chairman of the Senate committee that drafted the amendments pointed out that:

> While the Board has, as a rule, tended to avoid any unnecessary proliferation of collective bargaining units, sometimes circumstances require that there be a number of bargaining units among nonsupervisory employees, *particularly where there is such a history* in the area . . .
>
> While the committee clearly intends that the Board give due consideration to its admonition to avoid an undue proliferation of units in the health care industry, it did not within this framework intend to preclude the Board acting in the public interest from exercising its specialized experience and expert knowledge in determining appropriate bargaining units.

Pet. App. 22-23; emphasis supplied by the court.

The court distinguished *Memorial Hospital of Roxborough* v. *NLRB*, 545 F.2d 351 (3d Cir. 1976); *Long Island College Hospital* v. *NLRB*, 566 F.2d 833 (2d Cir. 1977), cert. denied, 435 U.S. 996 (1978); and *NLRB* v. *West Suburban Hospital*, 570 F.2d 213 (7th Cir. 1978). In those cases reviewing courts reversed the Board's unit determinations because the Board failed to consider adequately the congressional admonition against undue proliferation of units. But, as the court of appeals held here, the NLRB's "determination not to include LPNs in a bargaining unit of technical employees was a considered decision in

which the Board balanced the policy against undue proliferation of bargaining units with the policy against disrupting existing bargaining relationships. This was the correct standard, and there was a rational basis for the decision" (Pet. App. 23).

ARGUMENT

Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b), empowers the Board to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this [Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *." The Board's determination of an appropriate unit involves "a large measure of informed discretion," and the decision of the Board is "rarely to be disturbed." *Packard Motor Co.* v. *NLRB*, 330 U.S. 485, 491 (1947).

Congress' extension of the Board's statutory jurisdiction to nonprofit health care institutions in 1974 did "not create special rules for bargaining unit determination in the health care industry" (*Memorial Hospital of Roxborough* v. *NLRB*, *supra*, 545 F.2d at 360). To be sure, both the Senate and House committees stated that "[d]ue consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry." S. Rep. No. 93-766, 93d Cong., 2d Sess. 5 (1974); H.R. Rep. No. 93-1051, 93d Cong., 2d Sess. 6-7 (1974); *Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor*

Relations Act, 1974 12, 274-275 (G.P.O. 1974). But, as the court of appeals correctly noted, this admonition was not intended to prevent the Board from approving small units in appropriate circumstances (see Pet. App. 22-23).[4]

In the instant case, the Board carefully weighed its policy of including LPNs in units of technical employees (a policy that serves to limit the number of bargaining units within a single hospital) against the special circumstance here, *i.e.*, that the LPNs at one of petitioner's two facilities were already represented in a separate unit—an arrangement that both parties had accepted and that had resulted in an effective collective bargaining agreement. The Board acted well within its discretion in excluding the LPNs from the new unit, concluding that it did "not desire to upset the stability in [the MLPNA-General] bargaining relationship" (Pet. App. 31). The Board thus accommodated established policy to the special facts of the case.

Petitioner contends (Pet. 7-8) that the Board has simply rubber-stamped the certification of a state agency, but petitioner is wrong. The effectiveness of the collective bargaining relationship between the LPNs at General and petitioner, not the state certification of the unit, was the dispositive factor. There-

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[4] Indeed, a proposal by Senator Taft (S. 2292, 93d Cong., 1st Sess. (1973)), which would have limited the Board to designating only four appropriate units in health care institutions—(1) professional employees, (2) technical employees, (3) clerical employees, and (4) service and maintenance employees—was not reported out of committee. See *Memorial Hospital of Roxborough* v. *NLRB*, *supra*, 545 F.2d at 360 n.12.

fore, the circumstances here are distinguishable from *Memorial Hospital of Roxborough* v. *NLRB*, *supra*, 545 F.2d at 354, 360-361; and *Long Island College Hospital* v. *NLRB*, *supra*, 566 F.2d at 837. In those cases there were on effective, established bargaining relationships between the hospitals and the state-certified units, and the courts found that the Board had simply deferred to the state certifications without making its own independent examination of the relevant factors.[5]

Similarly, the instant case presents no conflict with *NLRB* v. *West Suburban Hospital*, *supra*, 570 F.2d at 215, where the court of appeals determined that the Board had not adequately considered the congressional desire to avoid the proliferation of hospital units. The Board took that into account here. And *St. Vincent's Hospital* v. *NLRB*, 567 F.2d 588, 592 (3d Cir. 1977), where the court found that the Board erred in certifying a unit of hospital boiler operators because, unlike the other service and maintenance workers, they were licensed by the state, also does not help petitioner. The decision here was not based on the factors involved in *St. Vincent's Hospital*, but on the importance of maintaining an existing, stable bargaining relationship.[6]

In sum, the Board and the court of appeals applied established principles to the particular facts of this case. There is no dispute about the principles themselves, and thus there is no reason to grant review.

[5] The Board's decision here is not inconsistent with *North Memorial Medical Center*, 224 N.L.R.B. 218, 219-220 (1976), where a limited unit based on an old state certification was rejected because, *inter alia*, the representative in the old unit had been decertified and there was no present collective bargaining relationship in that unit. These factors are not present here.

[6] Petitioner's contention (Pet. 12-13) that the Board's definition of the unit was "ambiguous and unsupported by the record" raises no issue warranting further review. The Board's post-election challenge procedure (A. 35-36) disposed of all outstanding questions of who was included in the unit. In any event, issues concerning the scope of the unit may be resolved through normal procedures for unit clarification. See the Board's Rules and Regulations, 29 C.F.R. 102.60(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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